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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 MANUFACTURED HOUSING  
11 COMMUNITIES OF WASHINGTON, a  
Washington non-profit corporation,

12 Plaintiff,

13 v.

14 ST. PAUL MERCURY INSURANCE  
15 COMPANY, a Minnesota corporation,

16 Defendant/Counterclaim Plaintiff,

17 v.

18 MANUFACTURED HOUSING  
19 COMMUNITIES OF WASHINGTON, a  
Washington non-profit corporation,

20 Plaintiff/Counterclaim Defendant.

CASE NO. C09-5088BHS

ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

21 This matter comes before the Court on Defendant's motion for summary judgment  
22 (Dkt. 33). The Court has considered the pleadings filed in support of and in opposition to  
23 the motion and the remainder of the file and hereby grants Defendant's motion for the  
24 reasons stated herein.

25 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

26 Plaintiff is a Washington nonprofit corporation comprised of landlords who own  
27 and operate manufactured home properties in Washington. *See* Dkt. 39.  
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1 This matter arises over a dispute regarding two insurance policies that Plaintiff  
2 purchased from Defendant. The type of insurance policy is referred to as “claims made  
3 and reported.” The first policy covered Plaintiff during the period of February 12, 2001  
4 until February 12, 2004. *See* Dkt. 39, Ex. A. The second policy covered Plaintiff between  
5 the period of February 12, 2004 until February 12, 2007. *See id.*, Ex B.

6 These policies each contained the same provision about when a claim must be filed  
7 in order to obtain coverage under the terms of the insurance agreement. The pertinent  
8 provision to the contract is 6(A), which provides:

9 A. The **Corporation** and the **Insured(s)** shall as a condition  
10 precedent to the right to be indemnified under this policy give to the Insurer  
11 notice in writing of any claim(s) made against the **Corporation** or the  
12 **Insured(s)** as soon as practicable and during the **Policy Period** or  
Discovery Period. Claim(s) first made and reported during the Discovery  
Period shall be treated as a claim(s) made during the **Policy Year**  
immediately preceding the Discovery Period.

13 Dkt. 38, Appendix ¶ 6.

14 In January 2004 Plaintiff was sued in litigation that underlies this matter. Dkt. 38  
15 at 6. Plaintiff claims this underlying litigation was commenced within one week of the  
16 expiration of the first of Plaintiff’s two policies. The underlying litigation was initially  
17 resolved by the entry of summary judgment in favor of Plaintiff. *See Holiday Resort*  
18 *Cmty. Ass’n v. Echo Lake*, 134 Wn. App. 210, 135 P.3d 499 (2006). The Washington  
19 State Court of Appeals reversed the trial court’s ruling in *Holiday*. *See id.* The Supreme  
20 Court of Washington denied review on July 10, 2007. *Holiday*, 160 Wn.2d 1019, 163  
21 P.3d 763. The matter is still in active litigation as of the filing of these pleadings. *See* Dkt.  
22 33 at 8.

23 The parties dispute when notice was provided to Defendant regarding the  
24 underlying litigation involving Plaintiff. Defendant contends notice was given in  
25 November 2007, long after the expiration of the first policy and approximately nine  
26 months after the second policy expired. Plaintiff contends notice was given on August 22,  
27 2007, which is still over six months after the expiration of the second policy and years  
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1 after the expiration of the first policy. Defendant moves for summary judgment on the  
2 issue of whether it owes Plaintiff coverage under the terms of Plaintiff's two claims-made  
3 policies. The parties also dispute the following issues: whether (1) the terms of the  
4 contract are ambiguous; (2) the "notice-prejudice rule" applies to the policy(ies) at issue;  
5 (3) the Washington Supreme Court would not decide this case in favor of Defendant; and  
6 (4) even if Plaintiff is unsuccessful in surviving Defendant's summary judgment motion,  
7 Plaintiff claims Defendant is liable for failing to comply with the relevant Washington  
8 Administrative Codes ("WAC").

9 This action was originally filed in state court, but Defendant removed to federal  
10 district court based on diversity jurisdiction. Dkt. 1. Defendant filed an answer and  
11 counterclaim to the complaint on February 24, 2009. Dkt. 5. On August 27, 2009,  
12 Defendant filed a corrected motion for summary judgment. Dkt. 33. On September 14,  
13 2009, Plaintiff filed a response to the motion for summary judgment. Dkt. 38. On  
14 September 18, 2009, Defendant filed a reply to the response. Dkt. 43.

## 15 II. DISCUSSION

### 16 A. Summary Judgment Standard

17 Summary judgment is proper only if the pleadings, the discovery and disclosure  
18 materials on file, and any affidavits show that there is no genuine issue as to any material  
19 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
20 The moving party is entitled to judgment as a matter of law when the nonmoving party  
21 fails to make a sufficient showing on an essential element of a claim in the case on which  
22 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
23 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,  
24 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
25 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
26 present specific, significant probative evidence, not simply "some metaphysical doubt").  
27 See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
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1 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
2 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
3 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
4 626, 630 (9th Cir. 1987).

5 The determination of the existence of a material fact is often a close question. The  
6 Court must consider the substantive evidentiary burden that the nonmoving party must  
7 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
8 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
9 issues of controversy in favor of the nonmoving party only when the facts specifically  
10 attested by that party contradict facts specifically attested by the moving party. The  
11 nonmoving party may not merely state that it will discredit the moving party’s evidence at  
12 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
13 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific  
14 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*  
15 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 16 **B. Defendant’s Motion**

17 Defendant moves this Court to enter summary judgment against Plaintiff in this  
18 matter. Dkt. 33. Defendant claims that Plaintiff failed to satisfy the condition precedent of  
19 Plaintiff’s insurance agreement with Defendant. *Id.* Defendant argues that such failure is  
20 fatal to any claim of coverage against it that Plaintiff may have purchased under the  
21 policies. *Id.* Plaintiff counters, in opposition, that (1) the terms of the contract are  
22 ambiguous; (2) the “notice-prejudice rule” applies to the policy(ies) at issue; (3) the  
23 Washington Supreme Court would not decide this case in favor of Defendant; and (4)  
24 even if Plaintiff is unsuccessful in surviving Defendant’s summary judgment motion,  
25 Plaintiff asserts Defendant is still liable for failing to comply with the relevant WACs.

26 As a threshold matter, before the Court can determine whether summary judgment  
27 is proper in this case, it must first decide whether Plaintiff’s assertions have merit.  
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## 1           **1.     Ambiguous Terms**

2           “Interpretation of an unambiguous contract is a question of law.” *Mayer v. Pierce*  
3 *County Medical Bureau, Inc.*, 80 Wn. App. 416, 420 (1995). But where a policy provision  
4 is ambiguous, it is construed against the insurer and the court applies the interpretation  
5 most favorable to the insured. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869  
6 (1990). Courts interpret insurance contracts as an average insurance purchaser would  
7 understand them. *Kirsch v. Ins. Co. of N. America*, 125 Wn.2d 164, 170, 883 P.2d 308  
8 (1994). In doing so, courts give undefined terms in such contracts their “plain, ordinary,  
9 and popular” meaning. *Id.* (citing *Boeing*, 113 Wn.2d at 877). Ambiguity exists only “if  
10 the language on its face is fairly susceptible to two different but reasonable  
11 interpretations.” *Washington Pub. Util. Dists. Utils. Sys. v. PUD 1*, 112 Wn.2d 1, 11, 771  
12 P.2d 701 (1989).

13           Here, Plaintiff contends that the provision of both policies concerning when a  
14 claim must be reported to Defendant is ambiguous. Dkt. 38 at 12. The policies provide  
15 that as a “condition precedent to the right to be indemnified” the corporation (Plaintiff)  
16 and the insureds must give “notice in writing of any claim(s) made . . . as soon as  
17 practicable and during the policy period.” *Id.* Plaintiffs assert these two requirements,  
18 practicability and “during the policy period,” are “contradictory and not capable of being  
19 complied with by the insured.” *Id.* As an example, Plaintiff notes that it may not always  
20 be practicable to report notice of a claim filed against the insured during the policy  
21 period. Plaintiff contends that Mr. Spencer (executive director for Plaintiff), as a non-  
22 lawyer and, therefore, the average purchaser of insurance, did only what a prudent person  
23 would do when confronted with a lawsuit, which was to hire a lawyer rather than filing a  
24 claim with his insurance carrier. Further, Plaintiff claims it was not practicable to notify  
25 the insurer until after summary judgment had been reversed because that was the first  
26 moment when the Plaintiff should have known that a viable claim had been filed against  
27 it. *See id.* at 14.

1 The Court finds Plaintiff's contention unavailing. The express purpose of the  
2 claims-made policies purchased by Plaintiff was to "insure[ ] against loss arising from a  
3 wrongful act alleged in any claim(s) first made and reported to the insurer during the  
4 policy period or discovery period (if applicable)." Dkt. 39, Ex. A. at 16. Further, the  
5 conjunctive language of the disputed proviso is unambiguous: one must, "as a condition  
6 precedent to the right to be indemnified under this policy give to the Insurer *notice in*  
7 *writing of any claim(s) made* against the Corporation or the Insured(s) . . . ." *Id.* (appendix  
8 at proviso 6(a) (emphasis added)). This provision counters Plaintiff's assertion that it was  
9 justified in waiting to alert Defendant until remand in the underlying litigation occurred.  
10 The provision requires the insured to give written notice when claims are made against it,  
11 not after months or years of litigation occurs. Indeed other courts have found such  
12 provisions to be unambiguous and the Court has no reason to disagree. *See, e.g., Pizzini v.*  
13 *American Intern. Specialty Lines Ins. Co.*, 210 F. Supp.2d 658, 668 (E.D. Pa. 2002)  
14 (finding comparable notice provisions in claims and reported policy "clear and  
15 unambiguous"); *Checkrite Ltd., Inc. v. Illinois Nat. Ins. Co.*, 95 F. Supp. 2d 180, 192-93  
16 (S.D.N.Y. 2000) (not finding ambiguity in comparable provisions); *AM. Cas. Co. v.*  
17 *Continisio*, 17 F. 3d 62, 68-69 (3rd Cir. 1994) (finding no ambiguity in the policy  
18 language and that requiring a formal notice of claim comports with claims-made policies).  
19 The Court agrees with and adopts the reasoning of these courts.

20 Therefore, the Court finds the language of the contract in dispute to be  
21 unambiguous because the language is not subject to more than one reasonable  
22 interpretation: if the insured fails to provide such written notice as soon as practicable and  
23 during the policy period, then coverage is precluded.

## 24 2. "Notice-Prejudice" Rule

25 Whether the "notice-prejudice" rule applies to claims made and reported policies,  
26 such as the policies at issue here, is a proper subject for summary judgment. *Safeco Title*  
27 *Ins. Co. v. Gannon*, 54 Wn. App. 330, 774 P.2d 30 (1989), *review denied*, 113 Wn.2d  
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1 1026, 782 P.2d 1069 (1989). *Gannon*, a declaratory judgment action, involved an escrow  
2 agent seeking entitlement under a claims-made policy to defense coverage in a related  
3 action. *Id.* at 333. The provision in question provided as follows:

4 If during the Policy Period . . . the Insured shall become aware of any fact  
5 or circumstance which may give rise subsequently to a claim hereunder and  
6 gives written notice to the Company during such period, then any  
7 subsequent claim made against the Insured arising out of such fact or  
8 circumstance shall, for the purposes of this policy, be deemed to have been  
9 first made during the policy period.

10 *Id.* at 335. The Washington State Court of Appeals noted that while the record established  
11 that the appellant knew of facts and circumstances that gave rise to a claim against him,  
12 the record also established that the appellant failed to give notice to the insurer during the  
13 policy period. *Id.* at 335. The court held, accordingly, that the appellant was not entitled  
14 to coverage. *Id.* at 341.

15 The Court finds that the provision in question in *Gannon* and the relevant facts are  
16 analogous to those presented in this matter. Further, like here, the appellant in *Gannon*  
17 argued that the notice/prejudice rule prevents the insurer from denying coverage. *See id.*;  
18 *see also* Dkt. 38 at 15. The *Gannon* court, in addressing the notice/prejudice rule stated  
19 that:

20 The notice/prejudice rule requires carriers, in order to exclude  
21 coverage because of an insured's failure to comply with the policy's notice  
22 requirement, to show actual prejudice resulting from lack of notice. . . . The  
23 rule applies to the notice provisions usually found in cooperation clauses,  
24 which exclude coverage if the insured fails to notify the insurer of accidents  
25 or occurrences in a timely manner.

\* \* \*

26 Claims-made policies . . . require that notification to the insurer be  
27 within a reasonable time. Critically, however, claims-made policies require  
28 that [ ] notice be given *during the policy period* itself. When an insured  
becomes aware of any event that could result in liability, then it must give  
notice to the insurer, and that notice must be given "within a reasonable  
time" or "as soon as practicable" - at all times, however, during the policy  
period.

With claims-made policies the very act of giving an extension of  
reporting time after the expiration of the policy period, . . . [would negate]  
the inherent difference between the [occurrence policies and claims-made  
policies]. Coverage depends on the claim being made and reported to the  
insurer during the policy period. If the claim is reported to the insurer  
during the policy period, then the carrier is legally obligated to pay; if the  
claim is not reported during the policy period, no liability attaches. If a

1 court were to allow an extension of coverage of reporting time after the end  
2 of the policy period, such is tantamount to an *extension of coverage* to the  
3 insured gratis, something for which the insurer has not bargained. This  
4 extension of coverage, by the court, so very different from a mere condition  
5 of the policy, in effect rewrites the contract between the two parties. This  
6 we cannot and will not do.

7 *Id.* at 336-38 (citations omitted). In holding that the notice/prejudice rule does not apply  
8 to claims-made policies, the court noted it was against public policy to hold otherwise. *Id.*  
9 at 339.

10 Plaintiff contends that public policy has shifted in Washington and that the  
11 *Gannon* case, which has been good law in Washington since 1989, should not be  
12 followed by the Court. While the Court is not persuaded by Plaintiff's argument, it  
13 considers its contention for want of thoroughness in this summary judgment order.

### 14 **3. Washington Precedent**

15 Where a federal court sits in diversity jurisdiction, it must apply the state  
16 substantive law. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938). "As a general rule, state  
17 law announced by the highest court of the State is to be followed." *Vacation Village, Inc.*  
18 *v. Clark County, Nev.*, 497 F.3d 902, 915 (9th Cir. 2007) (internal citation and quotes  
19 omitted). Where the state supreme court has not had occasion to decide such an issue, the  
20 district court may look to a state appellate court decision that is on point as persuasive  
21 authority in the matter. *West v. American Te. & Tel. Co.*, 311 U.S. 223, 237-38 (1940);  
22 *see also Golden West Refining Co. v. SunTrust Bank*, 538 F.3d 1233, 1237 (9th Cir.  
23 2008). Here, it is undisputed that the Washington State Supreme Court has not had  
24 occasion to decide a case on the subject presented. Thus, the Court is permitted to look to  
25 the Washington Court of Appeals for persuasive authority.

26 As discussed above, *Gannon* is nearly on all fours with the instant matter. The  
27 *Gannon* court rejected the notice/prejudice rule in the context of claims-made and  
28 reported policies. 54 Wn. App. at 337. Nonetheless, Plaintiff contends that *Gannon* should  
not be followed. Plaintiff asserts that the insurance market has dramatically shifted since  
the ruling in *Gannon*, some twenty years ago. Relying on another Washington case,



1 Plaintiff asserts that while *Gannon* stands for the proposition that occurrence policies and  
2 claims-made policies should be treated differently, this is not always the case. *See* Dkt. 38  
3 at 15 (relying on *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 91 P.3d 864,  
4 867 (2004)). But Plaintiff's reliance on *Steen* is misplaced.

5 To begin with, *Steen* cites to *Gannon* with approval. More importantly, *Steen*  
6 concerned a Washington statute, RCW 48.18.320, which precluded "any agreement  
7 between the insured and the insurer to retroactively annul an insurance policy after the  
8 occurrence of an event for which the insurer may be liable." *Id.* at 519 (internal  
9 quotations omitted). Here, we are not presented with a retroactive annulment, nor is there  
10 a statute controlling the provision at issue. In short, *Steen* does not support Plaintiff's  
11 argument that *Gannon* should not control. Perhaps more compelling is that *Gannon* has  
12 stood without change for twenty years. The Washington Legislature has had ample time  
13 to enact a statute to prevent further application of the *Gannon* decision, and Plaintiff has  
14 not cited to any such legislation.

15 Plaintiff puts forth several other cases in effort to undermine the longstanding  
16 import of *Gannon*. *See, e.g., Public Utility District No. 1 of Klickitat County v.*  
17 *International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) (not involving a claims-  
18 made and reported policy); *Mut. Of Enumclaw Ins. Co. v. U.S.F. Ins. Co.*, 164 Wn.2d  
19 411, 191 P.3d 866 (2008) (not discussing claims-made policies or *Gannon*). While  
20 Plaintiff does cite several cases showing that changes in the insurance market may have  
21 occurred in the past twenty years, the Court cannot simply disregard *Gannon* on this  
22 basis.

23 Plaintiff next argues that there is a split of authority among the courts regarding  
24 whether or not the notice/prejudice rule is operable on claims-made insurance policies.  
25 *See* Dkt. 38 at 17. But, as Defendant correctly points out, this argument mischaracterizes  
26 the term "split." However, the Court must only be concerned with a split among the  
27 appellate courts in Washington. In such a case, the Court would certify a question to the  
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1 Washington State Supreme Court as the rule in Washington would be unresolved or  
2 unclear. Since no such split exists in Washington, Plaintiff’s “split of authority” argument  
3 fails.

4 Finally, Plaintiff contends that public policy in Washington does not favor  
5 Defendant’s interpretation of the law and the applicability of *Gannon*. *See id.* Plaintiff  
6 claims that WAC 284-30-350(4) “clearly establishes it is the public policy of Washington  
7 that prejudice to the insurer’s rights is required before a claim can be denied on the basis  
8 of failure to give notice within a specified time limit.” Dkt. 38 at 17. But the actual  
9 language of WAC 284-30-350(4) is in direct contrast to Plaintiff’s claim. It provides, in  
10 relevant part, that “[n]o insurer shall, *except where there is a time limit specified in the*  
11 *policy*, [require] the claimant to give written notice of loss or proof of loss within a  
12 specified time limit . . . unless the failure to comply with such time limit prejudices the  
13 insurer’s rights. WAC 284-30-350(4) (emphasis added). This proviso supports a policy  
14 contrary to that asserted by Plaintiff. Plaintiff attempts to argue that there is no “specific  
15 time under the policy to give notice.” This argument disregards the previously discussed  
16 principle that claims-reported clauses require notice to be given when practicable after the  
17 claim becomes known to the insured and during the policy’s effective period.

18 In short, the Court finds *Gannon* to be persuasive and adopts its reasoning in this  
19 matter for several reasons. The case has stood for twenty years, the Washington State  
20 Supreme Court denied review in *Gannon*, and, to this Court’s knowledge, the Washington  
21 State Legislature has yet to enact a contrary statute. Because Plaintiff failed to provide  
22 timely notice to Defendant, there is no coverage owed by Defendant under the policies  
23 purchased by Plaintiff.

#### 24 **4. Existence of a Material Fact**

25 Based on the foregoing, the only issue the Court must address with respect to the  
26 policy provision in question is whether there is a issue of material fact that precludes the  
27 entry of summary judgment in favor of Defendant. The critical question is whether  
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1 Plaintiff provided timely notice, the condition precedent to invoking the provisions of  
2 Plaintiff's insurance policy. If not, Plaintiff cannot claim coverage from Defendant for the  
3 underlying litigation.

4 Here, the parties dispute whether notice was timely. *Compare* Dkt. 33 with Dkt.  
5 38. The parties dispute the date on which Defendant was put on notice of the underlying  
6 litigation. *Id.* Plaintiff argues it put Defendant on notice on August 22, 2007. Dkt. 38 at 8.  
7 Defendant, on the other hand, asserts proper notice was delivered in November of 2007.  
8 The Court must resolve any factual issues of controversy in favor of the nonmoving party  
9 only when the facts specifically attested by that party contradict facts specifically attested  
10 by the moving party. *T.W. Elec. Service, Inc.*, 809 F. 2d at 630. In so doing, the Court  
11 finds that this discrepancy is not material to the resolution of Defendant's motion for  
12 summary judgment. Relevant here are the dates on which the policies terminated and the  
13 date on which the underlying litigation was filed. These dates are not in dispute. *Compare*  
14 Dkt. 33 with Dkt. 38. The first policy's coverage began February 12, 2001 and ended  
15 February 12, 2004. Dkt. 38 at 4. The second policy's coverage began February 12, 2004  
16 and ended February 12, 2007. The underlying litigation was filed in January of 2004. It is  
17 evident from these dates that even taking the date of notice asserted by Plaintiff, August  
18 22, 2007, Plaintiff still failed to provide notice during the effective policy period.  
19 Moreover, Plaintiff failed to provide any notice until, at the earliest, August 22, 2007,  
20 which was well over three years after the first policy expired and approximately six  
21 months after the second policy expired.

22 Because Plaintiff failed to provide timely notice to Defendant of the early 2004  
23 claim filed against it, coverage is precluded under the terms of the insurance contracts.

## 24 **5. WAC Violations**

25 Plaintiff claims Defendant "violated the trade practices required by the [WAC]."  
26 Dkt. 38 at 22 (capitalization edited). Plaintiff contends that the Court can rule on such  
27 matters regardless of its ruling on the summary judgment motion. But, Plaintiff's own  
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1 amended complaint limits the allegations to whether Defendant owes a duty to defend or  
2 indemnify Plaintiff. Dkt. 26, ¶¶ 8-11. Fed. R. Civ. P. 8(a) requires Plaintiff to provide  
3 Defendant notice of the claims lodged in order for Defendant to adequately prepare a  
4 defense. Fed. R. Civ. P. 8(a)(2) (requiring a short and plain statement). It is improper,  
5 therefore, in a motion for summary judgment, to bring new claims of liability. *See*  
6 *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1313 (11th Cir. 2004) (holding it  
7 improper to assert new claims for relief on a summary judgment motion). Plaintiff has  
8 other rules at its disposal for bringing claims against Defendant. *See* Fed. R. Civ. P. 15  
9 (permitting a plaintiff to amend his or her complaint).

10 Therefore, because these claims are not properly before the Court, it declines  
11 Plaintiff's invitation to rule on them.

### 12 C. Conclusion


13 The Court finds that there is no genuine issue as to any material fact and that  
14 Defendant is entitled to judgment as a matter of law on the issue of coverage under the  
15 insurance policies.

### 16 III. ORDER

17 Therefore, it is hereby **ORDERED** that Defendant's motion for summary  
18 judgment (Dkt. 33) is **GRANTED** as stated herein.

19 DATED this 2nd day of October, 2009.

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BENJAMIN H. SETTLE  
United States District Judge